

IN THE COURT OF APPEALS 12/29/95
OF THE
STATE OF MISSISSIPPI
NO. 94-CA-00393 COA

MAXINE ROSS

APPELLANT

v.

DR. KYLE BALL A/K/A DAVID KYLE BALL

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT LOUIS GIBBS

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

J. ANTHONY WILLIAMS

LESLIE RIDDLEHOOVER BROWN

BARRY W. GILMER

ATTORNEYS FOR APPELLEE:

STEPHEN P. KRUGER

WALTER C. MORRISON IV

NATURE OF THE CASE: MEDICAL MALPRACTICE

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR DR. BALL

BEFORE FRAISER, C.J., BARBER, AND McMILLIN, JJ.

FRAISER, C.J., FOR THE COURT:

Maxine Ross appeals from a summary judgment granted to Dr. Kyle Ball in this medical malpractice action in the Circuit Court of Hinds County. On appeal, Ross assigns three errors: (1) the trial court erred in granting summary judgment where there was a genuine issue of material fact regarding the existence of a contract; (2) the trial court erred in holding as a matter of law that expert testimony is necessary in matters involving evidence within the common knowledge or understanding of lay persons; and (3) the trial court erred by holding the summary judgment hearing a day early. Our consideration of the assigned issues reveals no basis for reversal. We affirm.

FACTS

On March 13, 1991, Dr. Ball diagnosed Ross with symptomatic uterine fibroids. To treat Ross's condition Dr. Ball scheduled her for surgery. Dr. Ball was to perform a frozen section dilation and curettage, a total abdominal hysterectomy, and possibly a bilateral-salpingo oophorectomy, culdoplasty or appendectomy. There is some question as to when Dr. Ball told Ross that an appendectomy might be part of her treatment; however, there is no question that a possible appendectomy was listed on the hospital's "consent to operation, anesthetic, and other medical services" form [consent form] which Ross signed prior to surgery. The consent form also provided that "I consent to the performance of operations and procedures in addition to or different from those now contemplated, whether or not arising from presently unforeseen conditions, which the above doctor or his associates or assistants may consider necessary or advisable in the course of the operation."

During the operation Dr. Ball decided that removal of Ross's appendix would be unwise. Dr. Ball explained that, "[d]uring this type of surgery, removal of the appendix, in its normal location, is an incidental procedure which is routinely done." Both Dr. Ball and the assisting physician noted that Ross's appendix was located in a retrocecal position but otherwise appeared normal. Dr. Ball explained that, "a retrocecal appendix represents an abnormal position in that it is located on the underside of the cecum. Removal of a retrocecal appendix is associated with a higher risk of complication, not only at the time of surgery but post-operatively." Dr. Ball concluded that, "[s]uch a procedure was no longer incidental to the surgery and, in view of the increased risk, I made the decision not to remove the appendix."

Ten days after the initial operation, Dr. Reuff determined that Ross's appendix had ruptured and emergency surgery was required. Dr. Reuff encountered a pinpoint perforation and adhesions of the appendix that were not present during the first surgery. Ross's appendix was successfully removed.

On April 6, 1993, Ross filed a complaint against Dr. Ball for breach of contract and medical negligence in the Circuit Court of Hinds County. On March 11, 1994, the circuit court entered summary judgment for Dr. Ball. The trial court held that there was no genuine issue of material fact and that summary judgment as a matter of law was appropriate. The trial court ruled that the consent form was not a valid written contract and the negligence claim was improper absent expert testimony to establish the standard of care.

DISCUSSION

I. The trial court was correct in holding that Ross did not have a viable breach of contract claim

The trial court was correct in holding that Ross did not have a viable breach of contract claim for three reasons. First, a medical consent form is not a valid written contract; second, the record reflects that the oral or written contract, if any, between Ross and Ball was not breached; and third, a contract that compels a physician to perform an operation in violation of his medical judgment is void as against public policy. Summary judgment is proper only where there are no issues of material fact and the moving party is entitled to judgement as a matter of law. *Triplett v. Dempsey*, 633 So. 2d 1011, 1013 (Miss. 1994).

The consent form is not a valid written contract. The trial court below followed the lead of the courts of Texas and Georgia in deciding that the consent form was not a valid written contract. *See Wilson v Board of Regents of the Georgia University Sys.*, 419 S.E.2d 916, 918 (Ga. 1992); *Tyson v Board of Regents of the University Sys.*, 414 S.E.2d 557, 559 (Ga. 1991); *Zapata v. Rosenfeld*, 811 S.W.2d 182, 184 (Tex. 1991). These courts held the particular consent forms before them were not valid written contracts because they lacked the requisite contract elements. *Wilson*, 419 S.E.2d at 918; *Tyson*, 414 S.E.2d at 559; *Zapata*, 811 S.W.2d at 184. In *Wilson* and *Tyson*, the court noted that the consent form was neither signed by the defendant nor any of its agents and that the consent form recited no consideration. *Wilson*, 419 S.E.2d at 918; *Tyson*, 414 S.E.2d at 559. In *Zapata*, the court held that the absence of Dr. Rosenfeld's signature rendered the agreement invalid. *Zapata*, 811 S.W.2d at 184.

Mississippi law dictates that a contract is not a valid written contract absent an offer, acceptance, and consideration. *Andrew Jackson Life Ins v. Williams*, 566 So. 2d 1172, 1177 (Miss. 1990). Careful examination of the consent form reveals no recitation of an offer or consideration. Thus, this consent form, like the *Wilson*, *Tyson* and *Zapata* consent forms, does not constitute a valid written contract. Ross also argues that there is a valid oral contract.

However, even if there was a valid oral or written contract between Dr. Ball and Ross, Dr. Ball did not breach that contract. To prevail on a breach of contract claim, the evidence viewed in the light most favorable to Ross must prove that (1) a valid binding contract existed, (2) Dr. Ball breached the contract, and (3) that Ross was damaged by the breach. *Warwick v. Matheney*, 603 So. 2d 330, 336 (Miss. 1992). Ross contends that the terms of the contract between her and Ball, whether oral or written, are embodied in the consent form. Again, the consent form provides that Ross' "consent to the performance of operations and procedures in addition to or different from those now contemplated, whether or not arising from presently unforeseen conditions, which the above doctor or his associates or assistants may consider necessary or advisable in the course of the operation." Dr. Ball could not have breached a "contract" to perform a surgery which was within his medical discretion to perform.

Even if the contract did not allow Dr. Ball to exercise his medical discretion in performing this operation, we would be bound to uphold the summary judgment because a contract that denied a

physician the right to exercise his medical judgment would be void as against public policy. To require a surgeon to take actions in conformance with a contract which fall below the minimum standard of care in the relevant medical community would contractually require a physician to commit malpractice. A contract to perform an act prohibited by statute or condemned by the courts of Mississippi is void as against public policy. *Heritage Cablevision v. New Albany Elec. Power Sys.*, 646 So. 2d 1305, 1315 (Miss. 1994). The Mississippi Supreme Court has held that a physician is required by law to practice medicine within the standard of care applicable to minimally competent physicians under similar circumstances. *West v. Sanders Clinic for Women*, 661 So. 2d 714, 718 (Miss. 1995). A contract which compels a surgeon to disregard the standard of care and remove an organ regardless of his professional judgment that the procedure is unnecessary and may lead to complications is void as against public policy.

II. Expert testimony is necessary in medical negligence cases unless evidence is within the common knowledge or understanding of lay persons

For a plaintiff to recover in a medical negligence action the conventional tort elements of duty, breach of duty, proximate causation and injury must be proven by a preponderance of the evidence. *Palmer v. Anderson Infirmary Benevolent Ass'n.*, 656 So. 2d 790, 794 (Miss. 1995); *Palmer v. Biloxi Regional Medical Ctr.*, 564 So. 2d 1346, 1355 (Miss. 1990); *Phillips v. Hull*, 516 So. 2d 488, 491-92 (Miss. 1987). Contrary to the ruling of the trial court, Ross contends, as a matter of law, that expert testimony showing a physician's duty and the actions that constitute a breach of that duty is not necessary in this case because the matter is one within the common knowledge of a layman.

"Our general rule is that the negligence of a physician may be established only by expert medical testimony with the exception for instances where a layman can observe and understand the negligence as a matter of common sense and practical experience." *Palmer*, 656 So. 2d at 794; *Walker v. Skiwski*, 529 So. 2d 184, 187 (Miss. 1988); see also *Palmer*, 564 So. 2d at 1355; *Phillips v. Hull*, 516 So. 2d 488, 491 (Miss. 1987); *Cole v. Wiggins*, 487 So. 2d 203, 205 (Miss. 1986). "Lay testimony is sufficient to establish only those things that are purely factual in nature or thought to be in the common knowledge of laymen." *Palmer*, 656 So. 2d at 794 (citing *Drummond v. Buckley*, 627 So. 2d 264, 268 (Miss. 1993)). "[A] plaintiff in a medical malpractice case must, through expert testimony, establish the applicable standard of care and a breach of that standard" and that "the physician's [breach of] duty proximately caused the plaintiff's injury." *Palmer*, 564 So. 2d at 1355, 1357; *Hull*, 516 So. 2d at 491; *Hall v. Hilbun*, 466 So. 2d 856, 871 (Miss. 1985).

Ross argues that this is a case where a layman can observe and understand the negligence as a matter of common sense and practical experience. We disagree. The alleged negligent act is Dr. Ball's failure to diagnose Ross's appendicitis during the initial operation and remove the appendix when it was observed under the cecum, causing an increased risk to the patient. The Mississippi Supreme Court has held that whether a circumcision was performed properly requires expert testimony and does not fall into the layman exception. *Walker v. Skiwski*, 529 So. 2d 184, 188 (Miss. 1988). The surgery performed in this case is more complex than a circumcision and therefore requires expert medical testimony to establish a violation of the standard of care. Further, a layman cannot diagnose an unhealthy appendix and even if a layman could diagnose an unhealthy appendix neither Ross nor her

husband, the only plaintiff's witnesses deposed by Ross's attorney, viewed Ross's appendix or the surgery. Therefore, they could not have witnessed a negligent surgical act or testified to the condition of Ross's appendix.

CONCLUSION

We do not address Ross's third alleged error because Ross cites no supporting authority. When an appellant cites no authority on a particular issue this Court is precluded from addressing that issue on appeal. *Bland v. Bland*, 629 So. 2d 582, 591 (Miss. 1993); *see also Century 21 Deep S. Properties v. Corson*, 612 So. 2d 359, 370 (Miss 1992). For all of the foregoing reasons the Hinds County Circuit's summary judgment in favor of Dr. Ball is affirmed.

THE SUMMARY JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IN FAVOR OF DR. BALL IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.